Supreme Court, U. S.
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In the Supreme Court of the United States

Term, 1978
No. 78-1103

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

vs.

MELVIN H. RITTER, JR.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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OPINIONS BY LOWER COURTS

1. August 9, 1973: Opinion of Atkins, P.J., refusing to suppress statements of the Respondent.

2. September 3, 1974: Opinion of Buckingham, J., overruling and refusing Respondent's post-trial motions.

3. July 7, 1975: Opinion of the Supreme Court of Pennsylvania, reported at *Commonwealth v. Ritter,* 462 Pa. 202, 340 A.2d 433 (1975), reversing the conviction of the Respondent on the basis that his confession was involuntarily given.

4. January 22, 1976: Order of Buckingham, J., refusing to suppress voluntary statements of the Respondent.

5. January 24, 1977: Opinion of Buckingham, J., overruling and refusing the Respondent's post-trial motions.

6. October 5, 1978: Opinion of the Supreme Court of Pennsylvania, reported at *Commonwealth v. Ritter,* Pa. , 392 A.2d 305 (1978), three Justices dissenting, reversing the conviction of the Respondent on the same basis as in the Opinion dated July 7, 1975.

JURISDICTION

The judgment sought to be reviewed was rendered by the Pennsylvania Supreme Court on October 5, 1978 (*Commonwealth v. Ritter,* Pa. , 392 A.2d 305 (1978)). Title 28 of the United States Code §1257(8) confers jurisdiction on the Honorable Court where the highest court of the state renders a final judgment where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

This case was decided by the Pennsylvania Supreme Court, which is the highest and final appellate court in the Commonwealth.

A State Supreme Court decision directing a state Defendant to be retried is a final judgment from which the state could appeal to Federal Supreme Court, since, in the event the Defendant were successful in obtaining an acquittal on retrial, the state would have no right to appeal. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 604, *rehearing den.* 385 U.S. 890 (1966). In this regard, the instant case is directly on point with *Oregon v. Mathiason,* U.S. , 97 S.Ct. 711, L.Ed. 2d (1977). In that case, a judgment of sentence was reversed and remanded by the Oregon Supreme Court. The state appealed on the basis of an alleged Fifth Amendment violation and writ of certiorari was issued by the United States Supreme Court.

The instant case involves the invocation of the Fifth Amendment of the United States Constitution (self-incrimination) and likewise, the Fourteenth Amendment (making the Fifth Amendment applicable to the several states).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

"No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, . . ."

U.S.C.S.—Constitution, Amendment, 5-End, page 1.

Amendment XIV, Section 1:

". . .; nor shall any state deprive any person of life, liberty or property, without due process of law; . . ."

U.S.C.S.—Constitution, Amendments 5-End, page 444.

QUESTIONS PRESENTED FOR REVIEW

The Respondent was convicted on January 29, 1976, of two counts of voluntary manslaughter and arson under the Pennsylvania Crimes Code, 18 P.S. . Prior to that date, Respondent had been convicted of the same offenses, but that conviction was reversed and remanded by the Pennsylvania Supreme Court on the basis that a confession, introduced at trial, was inadmissible because the Respondent was incapable of waiving his *Miranda* rights.

At the retrial, statements given by the Respondent, voluntarily and without benefit of interrogation, were admitted into evidence over the objection of the Respondent.

This second judgment of sentence was appealed to the Pennsylvania Supreme Court. On October 5, 1978, the Court, in a four (4) to three (3) decision, reversed the conviction and remanded the case to the York County Court. This decison was based on the fact that the Respondent did not make the statements of his own free will because of his physical and mental exhaustion.

The question presented is:

> Does the fact that a suspect is in a weakened condition, which would justify a finding that he could not effectuate a waiver during police interrogation, require the exclusion of spontaneous, volunteered statements which are made in the absence of police interrogation or coercion?

STATEMENT OF THE CASE

The Respondent was indicted for arson and two counts of murder—voluntary manslaughter under the 1939 Crimes Code of Pennsylvania. Prior to trial, the Respondent filed a motion to suppress a confession (Appendix vii). This motion was overruled and refused by Atkins, P.J. (see Appendix i). At trial during August 13-15, 1973, a jury convicted the Respondent of arson and two counts of voluntary manslaughter. Post-verdict motions were dismissed and an appeal was taken to the Pennsylvania Supreme Court (see Appendix ii). One of the critical pieces of evidence at the trial was the Respondent's confession that he started the fire in the apartment building by setting fire to some boxes in a closet therein.

The Respondent's conviction was reversed by the Pennsylvania Supreme Court at *Commonwealth v. Ritter*, 462 Pa. 202 (1975) (see Appendix iii) on the ground that the evidence showed that the Respondent, who was in dire need of psychiatric help and exhausted at the time he gave his confession to the police officers, was in no condition to knowingly and intelligently waive his *Miranda* warnings and thereafter confess. This decision was based on the following evidence:

1. the fire occurred on November 17, 1972;

2. the Respondent was arrested by the police on November 21, 1972, and arrived at police headquarters around midnight on that date;

3. the interrogating officer felt that the Respondent had a psychiatric problem, and, in fact, he attempted to contact a psychiatrist prior to the interrogation;

4. The officer stated that the Respondent whimpered, sobbed and really looked tired during the course of the interrogation and

5. there was testimony that the Respondent had not slept for three days prior to his arrest.

Subsequent to the reversal, another motion to suppress was filed (Appendix viii), seeking to suppress certain spontaneous utterances that the Respondent had made approximately twelve (12) to thirteen (13) hours after his arrest. This motion was overruled and refused by Buckingham, J. This second hearing incorporated the testimony at the first hearing, plus the testimony of numerous police officers (Appendix ix). The Court, in its order (see Appendix iv), found that the Respondent had not shown that his mental condition was such as to render his spontaneous statements unreliable or untrustworthy.

At the Respondent's retrial, January 26-29, 1976, a jury again convicted the Respondent of arson and two counts of voluntary manslaughter. At this trial, the statements, subject to the second suppression motion, were admitted over objection. Subsequently, post-trial motions were filed and overruled by Buckingham, J. (see Appendix v). Once again, the Respondent appealed to the Pennsylvania Supreme Court.

In an opinion dated October 5, 1978 (see Appendix vi), the Court once again reversed the judgment of sentence. The Court, relying heavily on its first opinion (at

462 Pa. 202), held that this statement was not the product of the Respondent's free will. This opinion is found at *Commonwealth v. Ritter,* Pa. , 392 A.2d 305 (1978).

ARGUMENT

The Pennsylvania Supreme Court Erred in Applying Federal Constitutional Standards, When, in Fact, the Statement Made by the Respondent Was Spontaneous and not the Result of Interrogation, Duress or Coercion

The facts herein clearly indicate that the suppressed statement of the Respondent was made spontaneously and without questioning by the police.

The Supreme Court of Pennsylvania in deciding the case applied, *Commonwealth v. Alston,* 456 Pa. 128, 317 A.2d 241 (1974), as well as their previous decision in *Commonwealth v. Ritter,* 462 Pa. 202, 340 A.2d 433 (1975).

Commonwealth v. Alston, supra, was decided on the Fifth Amendment to the United States Constitution and interpretations thereof found in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 604, reh. den. 385 U.S. 890 (1966); *Culombe v. Connecticut,* 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 2d 1037 (1961), and *Rogers v. Richmond,* 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed. 2d 760 (1960). These cases hold that a statement or confession offends due process and the Fifth Amendment where the Defendant's will has been overborne and his capicity for self-determination critically impaired. "The line of distinction is that at which governing, self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." *Rogers v. Richmond,* supra.

It should be noted that every one of these cases, including *Alston,* supra, involved custodial interrogation. As

has been before noted, the statements made by the Respondent in the instant case were not the result of interrogation of any kind.

"It is (also) axiomatic that the Amendment (Fifth) does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials. 'It does not preclude a witness from testifying voluntarily in matters which may incriminate him,' for 'those competent and freewilled to do so may give evidence against the whole world, themselves included.' Indeed, far from being prohibited by the Constitution, admissions of guilt by wrong-doers, if not coerced, are inherently desirable. . . ., the Fifth Amendment proscribes only self-incrimination obtained by a 'genuine compulsion of testimony.' Michigan v. Tucker, supra, 417 U.S., at 440, 94 S.Ct. at 2361. Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. Accordingly, unless the record reveals some compulsion, Respondent's incriminating testimony cannot conflict with any constitutional guarantees of the privilege." *United States v. Washington,* 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed. 2d 238 (1977); *Hoffa v. United States,* U.S. , 87 S.Ct. 408, L.Ed. 2d (1966).

"Volunteered statements are competent evidence, and their admission is not barred under any theory of law, state or federal." *Hardy v. North Carolina,* 17 N.C. App. 169, 193 S.E. 2d 459 (1972), *cert. den.* 414 U.S. 999 (1973). In Pennsylvania, the Courts have consistently stated that a statement that is made but which is not the result of interrogation does not fall within the purview of *Miranda v. Arizona,* supra, and its progeny. *Commonwealth v. Davis,*

460 Pa. 37, 331 A.2d 406 (1975), *Commonwealth v. Whitman,* Pa. Super. , 380 A.2d 1284 (1977).

What these cases say is that absent custodial interrogation or at least coercive interrogation, the Fifth Amendment strictures will not apply. Custodial interrogation is defined as questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action. *Oregon v. Mathiason,* U.S. , 97 S.Ct. 711, L.Ed. 2d (1977). A statement given in response to interrogation is one which is given in response to police questions "calculated to, expected to or likely to elicit an incriminating response." *Miranda v. Arizona, Commonwealth v. Davis,* supra.

The Petitioner submits that under this case law, the Pennsylvania Supreme Court was in error in suppressing the statements of the Respondent. The testimony at the suppression hearing established that, although the Respondent was in custody at the time the statement was made, he was not being subjected to any type of interrogation, duress or coercion. In fact, the Suppression Judge made specific findings of fact in this regard.

> "We, therefore, conclude as a matter of law and find as a fact for the purposes of this suppression hearing that when the Defendant made the statement to the police in the police car going to the prison that afternoon that he was able to know what he was doing, that the statements were made voluntarily, without any coercion and while he was being interrogated by the police. . . ."
>
> Order, Buckinham, J., dated January 22, 1976, (See Appendix iv).

Simply put, the issue presented to the Pennsylvania Supreme Court was not one of constitutional dimensions. It was a simple evidentiary problem somewhat akin to the competency of a witness to testify. Where a Defendant voluntarily and spontaneously admits an offense, the court is not "faced with a confession and the attendant question of whether Appellant was competent to waive his constitutional rights against self-incrimination without the advice of counsel. Instead, Appellant's competency to make those admissions is governed by rules of testimonial capacity, which are in turn principally concerned with trustworthiness." *Commonwealth v. Ware,* 459 Pa. 334, 329 A.2d 258 (1974). This issue is one which must be decided by the trial court. It is not reviewable in the absence of a clear abuse of discretion. The sole question is "does the witness lack the requisite mental capacity to perceive the event in question with a substantial degree of accuracy." *Commonwealth v. Baker,* 466 Pa. 479, 353 A.2d 454 (1976).

Here, the Suppression Court based its decision on the evidence before him. Having done so, the decision was not reversible absent a clear abuse of discretion. The Pennsylvania Supreme Court bypassed this ruling by basing its decision on constitutional grounds, even though there was no constitutional question. What the Pennsylvania Supreme Court is doing is expanding the area where Fifth Amendment strictures apply. Such a decision that Court cannot make.

In this respect, the case clearly resembles *Commonwealth of Pennsylvania v. Campana,* 452 Pa. 233, 304 A.2d 432 (1973), judgment vacated and case remanded 414 U.S. 808, 94 S.Ct. 73, 38 L.Ed. 2d 44 (1973). In that case, the Pennsylvania Supreme Court attempted to expand the

double jeopardy prohibitions of the United States Constitution. The judgment was vacated and the case remanded by this Honorable Court. Petitioner submits that the result here must be the same.

CONCLUSION

The Petitioner prays the Honorable Court to issue a writ of certiorari to the Pennsylvania Supreme Court in that the said Court improperly applied constitutional sanctions to a fact situation not within the scope of protection of the Fifth Amendment to the United States Constitution.

Respectfully submitted,

JOHN C. UHLER
District Attorney

FLOYD P. JONES
Assistant District Attorney
Attorneys for Petitioner

APPENDIX I

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

No. 210 October Sessions, 1972
Murder, Manslaughter

COMMONWEALTH

v.

MELVIN H. RITTER, JR.

Appearances:

For the Commonwealth—HAROLD N. FITZKEE, JR., District Attorney.

For the Defendant—ALLEN H. SMITH, Esq.

OPINION

This case is before the Court on a motion filed by counsel for the defendant to suppress as evidence confessions allegedly made to the York City Police and to the Pennsylvania State Police. The matter was heard by the Court, and at the conclusion of the hearing defense counsel asked for a further hearing to obtain testimony from a witness whose identity had not been disclosed, and who was referred to by the State Police as a "confidential infor-

mant." It appeared that this individual was present with this defendant at the time the defendant was taken into custody by the Pennsylvania State Police at the home of the defendant's father. This individual also accompanied the defendant to the State Police Barracks where he was present at least part of the time during which there was interrogation of the defendant by the Pennsylvania State Police, and the subsequent reduction into writing of the statements made by the defendant at the State Police Barracks.

At that time we scheduled a hearing to be held Wednesday, August 8, 1973, at 1:30 P.M., and directed the District Attorney's office to make this witness available to the defendant at said hearing. A few days before August 8, the District Attorney advised the Court that the person described as a "confidential informant" had considerable apprehension concerning an appearance by him at a hearing due to threats allegedly made against his life by the defendant. The District Attorney also advised the Court that this individual is represented by Carl H. Cordes, Esq., a member of this Bar.

We suggested then to the District Attorney that he arrange to have Mr. Cordes and Allen H. Smith, Esq., defendant's counsel, join him in chambers with the Court to discuss this matter. Such a meeting took place, at which time it was agreed that defense counsel would have the opportunity to examine the witness under oath, and that his testimony would be made a part of the record regarding the suppression. This was done. The Court has familiarized itself with the testimony of the witness by having the reporter read her notes to the Court. We have been advised that in view of this testimony no further hearing need be held regarding the motion to suppress.

In his motion defendant's counsel raises several issues; the first of which is, that the applicant was not mentally competent at the time the confessions were made. There was no competent evidence presented at the hearing to support this allegation. The defendant was, at the request of his counsel, committed to the Harrisburg State Hospital after he had been arrested on this charge, for the purpose of having him undergo an examination to determine his competence. That examination was completed, and he was released from the hospital prior to the hearing on this motion. Neither the defendant nor the District Attorney saw fit to offer any report of the finding by the hospital staff. Since no testimony was presented to show his incompetence, and particularly in light of the failure to submit the report, which would seem to be highly relevant evidence regarding this issue, it would tend to support the conclusion that the report of the findings at the hospital support competence rather than incompetence. We conclude that the defendant is competent.

The second issue is that the applicant was under fear and duress at the time the confessions were made. The testimony did show that the defendant when he was at the State Police Barracks was nervous and concerned. But, there was no testimony to support any charge of duress, nor did the evidence indicate that he was sufficiently fearful to cause anything that he said to be suppressed.

He next objects that his counsel was not notified by the police to be present at the time of the interrogation. It is stated in the motion that the police knew that the defend-

ant was represented by counsel, but this allegation is not supported by any evidence in the record, at least so far as the State Police are concerned.

The record does show that he was fully advised of his constitutional rights by the giving of warnings suggested by the United States Supreme Court in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694.

We conclude that the defendant did understand that he was not required to make any statements, that he had the right to consult with counsel and to have counsel present during any interrogation, and that he further understood that even after waiving these rights he was at liberty to reassert them at any time.

So far as the police for the City of York are concerned there is nothing in the record to indicate that any statement was made to them. Consequently, we are not concerned at that point with anything that may have occurred regarding the York City Police.

It is then alleged that inducements were made to the accused in order to obtain his confessions, which inducements were illegal and unlawful. The only thing in the record that could possibly be construed as inducements were statements made by Trooper Soprano of the Pennsylvania State Police, that he would try to obtain psychiatric help for the defendant. This statement was made after the defendant complained that he was upset and that he did need treatment by a psychiatrist. In no way was there anything said that would support any inference or conclusion by the defendant that any intention on the part of the trooper to make the attempt to get such help was conditioned upon the giving of any statement by the defendant to the police.

There was testimony also that the police had said that he would be at Harrisburg State Hospital by 9:00 A.M., the next morning. This was denied by the police, and we do not agree that such promises were made.

It is further alleged that the accused was subjected to long periods of interrogation before the confessions were given. The record indicates that he was taken to the State Police Barracks near midnight, and that within a period of approximately (4) hours the interrogation was completed, reduced to writing and signed. It further appears that during this time his father, and the person referred to above as a "confidential informant", were present during much of the time when the interrogation was conducted and when the statement was signed.

It is next alleged that the defendant was not effectively warned of his right to remain silent, of the right to the presence of his attorney, and that anything he said would be used against him. We find from this record without difficulty that all of these warnings were given to the defendant, and that he fully understood the import of them.

For these reasons we enter this

ORDER

AND NOW, TO WIT, August 9, 1973, it is ordered, adjudged, and decreed that the motion to suppress the statement given by the defendant to the Pennsylvania State Police be and is hereby refused.

By the Court,
George W. Atkins
P.J.

APPENDIX II

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

Criminal No. 210 October Sessions, 1972
Arson; Murder; Manslaughter (2 cts)

COMMONWEALTH

vs.

MELVIN H. RITTER, JR.

Appearances:

Morrison B. Williams, Esquire, Deputy District Attorney, with him, Donald L. Reihart, Esquire, District Attorney, for the Commonwealth.

Allen H. Smith, Esquire, for the Defendant.

OPINION

The defendant was charged with two counts of murder-manslaughter and one count of arson. He was tried by a jury in a trial presided over by President Judge George W. Atkins, now deceased. The jury returned a verdict of guilty of manslaughter in two counts and guilty of arson.

The defendant filed motions for a new trial and in arrest of judgment which were argued before the court en banc and this opinion and order are filed for the court en banc. Defendant's motions were based on a large number of grounds but he has briefed and argued only four. Accordingly, we consider the balance of them abandoned and they shall be dismissed.

A discussion of the evidence supporting the verdict is in order. The Commonwealth showed at trial that the defendant resided in one of the apartments of a four-story apartment house situated at 15 South West Street in the City of York, Pennsylvania. At approximately 6:00 A.M. of November 17, 1972, a fire broke out in the building which was not extinguished until 3:30 o'clock that afternoon and which resulted in the death of two of the tenants. Robert W. Little, Jr., The Fire Chief of York City, testified that after helping to fight the fire and conducting an investigation thereafter, it was his opinion that the fire started in a closet under the stairway on the first floor and that the fire was incendiary in nature.

Trooper Elmer Soprano of the Pennsylvania State Police, who also investigated the fire, testified that he interrogated the defendant at the State Police Barracks in York on November 21, 1972 and the defendant gave him a written statement saying that he started the fire by lighting a box in the above mentioned closet, that he didn't know why he did it and that he did it without the intention of hurting anyone. The defendant had an electrician testify for him that the fire was caused by faulty wiring. The defendant testified that he left the apartment building at 6:00 A.M. of the morning of the fire to go to work, that he had forgotten his sun glasses and while on the way back to the

apartment to secure them, a friend told him that the place was on fire, that he then ran into the building and helped his girl and her child to safety, that while he was inside the building the smoke and explosion knocked him to his knees and he fell down the steps, that after he came outside, he helped the firemen to fight the fire, that after about 45 minutes, believing everyone to be safe, he rode to work but remembered nothing thereafter including being interrogated by the State Police, signing any statements or even talking to his lawyer in the York County Prison shortly after the day of the fire.

Defendant first contends that Judge Atkins erred in refusing to grant a change of venue. A hearing was held on this issue and defendant introduced into evidence several York newspaper articles, dated April 10, 1973, wherein the case was discussed and a reference was made to Trooper Soprano's accouncement to the press that defendant confessed to setting the fire. One of the articles was headlined that the defendant admitted setting the fire. In an opinion filed August 10, 1973, Judge Atkins refused a change of venue because he felt that defendant's reliance on *Commonwealth v. Pierce*, 451 Pa. 190 (1973) was misplaced and because the petition was not timely filed under Rule of Criminal Procedure 305 and there was no reason for the failure to file it on time.

We believe Judge Atkins was right on both counts. In *Commonwealth v. Pierce*, where a venue change was granted, there appeared in the news media; (1) defendant's confession; (2) his prior criminal record of arrests and convictions; (3) defamatory statements on the merits of the case and the character of the defendant; (4) the possibility or implication that defendant may plead guilty and (5) a

police staged reconstruction by the defendant of the crime. The victims there were a practicing lawyer and a seminarian. In our case, only one of those five activities proscribed in *Pierce* is present—the published confession of the defendant. We concur with Judge Atkins' decision that the pre-trial publicity here did not even remotely approach the level of prejudice present in *Pierce*. In any event, as we have indicated, defendant is clearly precluded by Rule of Criminal Procedure 305.

Defendant secondly contends that the verdict of arson-manslaughter is inconsistent and must fall because there was no evidence of provocation or passion. However, our Supreme Court has always held that the return of a verdict of voluntary manslaughter is strictly the jury's prerogative even in the absence of provocation or passion. *Commonwealth v. Butcher*, 451 Pa. 359 (1973).

Defendant's third argument is that his confession should not have been admitted into evidence. At the suppression hearing before Judge Atkins, it developed that Trooper Soprano offered defendant to obtain some psychiatric help for him and that defendant was nervous and concerned. These are the only facts upon which defendant relies in his brief. From these facts he argues that his statements were not voluntary. In an opinion and order, filed August 9, 1973, Judge Atkins found otherwise and refused to suppress the statements. We have reviewed the evidence in its entirety and fully concur with his decision, particularly since there is no question that the defendant was advised of his "Miranda" rights and there is nothing whatever to indicate that defendant was in any way improperly induced or forced to make a statement. The record indicates that he was taken to the State Police Barracks at about mid-

night and his interrogation lasted only four hours before he signed the statement. Moreover, his father was present during this entire time.

Defendant's last contention that Chief Little was not competent to testify as to the cause of the fire solely because he is not an electrician by trade is absurd. He had over twenty years experience as a paid fireman for the City of York and was Chief of the Department since 1963. He attended fire training schools and a number of Pennsylvania State Police seminars on arson investigation. Additionally, he had been an instructor for both paid and voluntary fire companies. Clearly, he was competent to testify and the weight of his testimony was for the jury. In view of all the foregoing, we enter the following:

ORDER

AND NOW, TO WIT, this 3rd day of September, 1974, the defendant's motions for a new trial and in arrest of judgment are overruled and dismissed. The defendant is directed to report for sentencing on Friday, the 18th day of October, 1974, at 10:00 A.M. We direct that a presentence investigation be done.

An exception is granted to the defendant.

By the Court,
(s) James E. Buckingham
Judge

APPENDIX III

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 58 May Term, 1975

COMMONWEALTH OF PENNSYLVANIA

v.

MELVIN H. RITTER, JR.

Appellant

Appeal from Judgment and Sentence of the Court of Common Pleas of York County, Criminal Trial Division, at No. 210 October Term, 1972.

OPINION OF THE COURT

O'BRIEN, J., Filed: July 7, 1975:

Appellant, Melvin H. Ritter, Jr., was tried by a judge and jury and found guilty of two counts of voluntary manslaughter. Post-trial motions were denied and appellant was sentenced to two concurrent terms of six to twelve years' imprisonment. This appeal followed.

The facts surrounding this appeal are as follows. On November 17, 1972, at approximately 6:00 a.m., a fire broke out in a four-story apartment building at 15 South West Street in the City of York, Pennsylvania. As a result of this fire, two residents in the apartment building were killed. An investigation of the fire revealed that it had been the result of arson and that appellant, also a resident in the building, confessed to Pennsylvania State Police that he had started the fire by setting fire to boxes in a closet within the apartment building. Based on certain other evidence, appellant was tried and convicted of two counts of voluntary manslaughter.

Appellant argues that his confession should have been suppressed as not being voluntary because of his mental and physical condition at the time it was given. We agree. Appellant was arrested by officers of the Pennsylvania State Police on November 21, 1972, and arrived at police headquarters around midnight on the evening of the 21st of November. At that time, he was given his constitutional rights and he subsequently confessed to the arson. Based on the testimony of Officer Soprano, who conducted the interrogation of appellant, we are of the opinion that appellant's confession was not voluntarily given. Officer Soprano, testifying at appellant's suppression hearing, stated that after he initially spoke with appellant, he decided that appellant had a psychiatric problem and, in fact, tried to reach a psychiatrist prior to questioning appellant. In addition, the officer stated that during the course of the interrogation, appellant was whimpering, sobbing and "really looked tired." Moreover, the officer stated that appellant had not slept for three days prior to his interrogation, which occurred from 12:00 midnight to 3:00 a.m. on the morning of the 22nd of November, 1972.

In *Commonwealth v. Alston*, 456 Pa. 128, 317 A.2d 241 (1974), this Court stated the following test for determining whether a confession is voluntary:

> "While there is of course no single litmus-paper test for determining constitutionally impermissible interrogation, we have long recognized that the ultimate test for voluntariness is whether the confession is the product of an essentially free and unconstrained choice by its maker. 'If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.' Culombe v. Connecticut, [367 U.S. 568] at 602 (1961); see also, Commonwealth ex rel. Butler v. Rundle, [429 Pa. 141] at 149, 239 A.2d at 430 (1968); Commonwealth v. Eiland, [450 Pa. 566] at 574, 301 A.2d at 654 (1973); Commonwealth v. Riggins, [451 Pa. 519] at 524, 304 A.2d at 476 (1973); Commonwealth v. Banks, 454 Pa. 401, 407, 311 A.2d 576, 579 (1973)." At page 131.

In the facts of the instant case, appellant's will was not overborne by direct police conduct during the interrogation. However, the testimony of the interrogating officer himself established that appellant was in no condition to knowingly and voluntarily confess to a crime, since appellant was, in the officer's own opinion, in dire need of psychiatric help and exhausted. The officer testified at the suppression hearing as follows:

"Q. When you were talking to this defendant, what was his action like what was his conduct; like describe him for us?

"A. Sometimes he was normal, sometimes very nervous upset, tired.

"Q. Did he tell you how he hadn't slept?

"A. I think a couple of days.

"Q. Did he appear exhausted?

"A. Yes.

* * * *

"Q. This defendant, was he crying during the course when you talked to him?

"A. Sometimes.

"Q. Was he whimpering?

"A. Yes.

"Q. You felt he had a problem, didn't you?

"A. Yes.

"Q. You felt this man really needed psychiatric help?

"A. Yes.

"Q. This is why you called Mr. Nixdorff?

"A. Yes."

Under these facts, we are of the opinion that the mental and physical condition of appellant, which was known to the interrogating officer at the time appellant gave his confession, clearly evidenced that appellant was in no condition to knowingly and intelligently waive his *Miranda* warnings and thereafter confess to the police.

Judgment of sentence reversed. Case remanded for proceedings consistent with this opinion.

Mr. Justice Nix and Mr. Justice Manderino took no part in the consideration or decision of this case.

APPENDIX IV

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

Criminal No. 210 October Sessions, 1972

(1) Arson

(2) Voluntary Manslaughter (2 cts)

COMMONWEALTH

vs.

MELVIN H. RITTER

For the Commonwealth—Richard H. Horn, Esquire, Asst. District Attorney.

For the Defendant—Allen H. Smith, Esquire.

York, Pa., Thursday, January 22, 1976

Before the Honorable James E. Buckingham, Judge

SUPPRESSION HEARING

In this case the matter is before the Court on three applications of the defendant. We will treat them in the following order: the first petition is for a change of venue.

There has been put into the record references to prior newspaper publicity prior to the first trial of this case in which were considered by the Supreme Court of Pennsylvania on appeal. At this hearing today, the defense has put in four newspaper articles from the two local newspapers of general circulation. We have not read those in full, but they have been read to us at least partially, important parts by defense counsel. We find as a fact that those newspaper articles refer only to the proceedings by the Supreme Court after its Opinion and what happened here in the lower court pursuant thereto. We think this all constitutes merely straight reporting without any editorializing upon the part of the papers in any way. The articles do not editorialize. They are not inflammatory. They are merely reportorials and report for the public consumptions necessary to what occurred. Taking the exhibits previously in the case and what was presented here today, we have no hesitation in making the following

ORDER

That the defendant's petition for change of venue in this case from York County is overruled and dismissed.

* * *

The second matter is on the application of the defendant to quash the complaint or the indictment. As we understand it, the chief grounds for this motion to quash or dismiss is on the grounds that statements by Det. Thompson and Det. Bloss of the York City Police are inadmissible. As we are going to rule that such statements are admissible, we have again no other alternative but to enter the following

ORDER

That the defendant's motion to quash the complaint or the indictment is overruled and dismissed.

* * *

The last matter is on the defendant's motion to suppress the statements of Det. Thompson and Det. Bloss and the statement of one, Gordon W. Spangler. The defendant's written application to suppress the evidence, of course, did not include any reference to Mr. Spangler's statement. This is because the defense did not know about Mr. Spangler's statement until it was introduced here today at the hearing. We felt that it was fair and we order that his motion to suppress Mr. Spangler's statement be incorporated nunc pro tunc. We will take Mr. Spangler's statement first.

Mr. Spangler testified, and incidentally, we make the following findings of fact from the testimony. Mr. Spangler testified that on November 6, 1972, he had a conversation with the defendant at the apartment house which was burned; that he discussed two things with the defendant. One was about a party which had happened a night or two before that and secondly, there was a discussion about some rent as to whether or not the defendant should receive a credit for $120 which the defendant told Mr. Spangler that he had put in a box on the premises for that purpose. Mr. Spangler, during that conversation, told the defendant that he would not give him any credit for any such rent money put into the box, which we understand, the defendant told him had been stolen from the box; thereafter, during that conversation, Mr. Spangler told him to leave the premises. Mr. Spangler testified, and we find as a fact, that the defendant then made a statement

to him, and we are not quoting that exactly, but the substance of the statement was, "I am going to burn your building." Of course, this statement was somewhere in the vicinity of 10 days before the fire actually occurred.

Mr. Spangler was cross-examined and examined at great length concerning this. He freely admitted that he never mentioned this to anyone until just recently; that he never testified to it before. We have found as a fact that the defendant made the statement to Mr. Spangler. We, therefore, rule since the statement was made to a layman and not to a policeman or police officer, that it is not really the subject of a suppression hearing under the circumstances.

ORDER

Accordingly, there being no evidence that the defendant was not of sound mind when he made the statement, we rule that the statement made to Mr. Spangler should not be suppressed and that such statement may be used in evidence against him at his trial. It goes without saying, that at trial it would be a question of fact for the jury as to whether or not the defendant did in fact make the statement to Mr. Spangler; if so, and under what conditions.

* * *

With respect to the statements made by the defendant to Det. Thompson and Det. Bloss, we find as further facts that the defendant made some statements to the state policeman at or about 2 o'clock in the morning of November 21, 1972. These statements made to the state police were admitted into evidence at his trial and upon appeal to the Pennsylvania Supreme Court, the matter was reversed by the Supreme Court on the grounds that at the time the defendant made the statements at or about 2 o'clock in the morning, the defendant was not in such emotional state as to be accountable for what he said.

Now, sometime after the statement of the defendant to the state police, the state police then took the defendant to commit him to the York County Jail, and under the evidence, he reached the jail at 9 o'clock of that same morning of November 21, 1972. Thereafter, at about 1 o'clock that afternoon, the defendant was taken to City Hall at police headquarters there in the City of York where he was processed for arraignment. Prior to that time, he had been read the warrant for homicide and for arson by one of the policemen and after he was processed at City Hall, he was taken to the Magistrate and there arraigned at about 2 o'clock in the afternoon. Then he was driven in a police car from the Magistrate's office to the prison.

On the way in the police car to the prison in the company of Det. Bloss and Det. Thompson, and as the defendant passed the scene of the fire or at about that time, the defendant voluntarily and without having been asked any questions by either of the policemen, made the statement "I didn't mean to kill those people. I didn't mean to hurt anyone." Moreover, at the time he was being processed at City Hall which was sometime between 1 o'clock in the afternoon and 1:30 o'clock in the afternoon of November 21, 1973, while the defendant was talking to Det. Bloss and at or about the time a radio broadcast was made concerning the defendant being charged with the various crimes in question. Again the defendant voluntarily and without being interrogated concerning the crimes made the statement in the presence of Det. Bloss, "I didn't kill anyone."

I have incorporated into evidence in this suppression hearing all of the testimony concerning the defendant's mental emotional condition prior to the time that he made the statements to the state police. The defendant himself testified here today that he does not remember anything concerning the events in question. The defendant's father testified that he saw the defendant either the morning of the 21st or the morning of the 22nd, but he does not remember which day, and the substance of the defendant's father's testimony was that the defendant couldn't remember anything and not accountable for what he said.

On the other hand, both Det. Bloss and Det. Thompson testified that when the defendant was in their presence, either at City Hall or in the car, the defendant appeared normal; that while it is true he did start to cry at or about the time he made the statements in the car, he appeared to be rational and was able to know what was going on. Gerald Sweeney, who was then a detective of the York City Police Department, also testified when he saw the defendant at City Hall the defendant knew what he was doing.

The question, therefore, is, in light of the Supreme Court's decision, whether or not under the facts before us, the Supreme Court having found at the time the defendant made the statements at or about 2 o'clock in the morning of the 21st that he was unaccountable because of his mental condition, whether or not without any further evidence that condition of the defendant which the Supreme Court found carried over until approximately 2:10 or 2:15 on the afternoon of the 21st when he made the statements in the car. Preliminarily, we might say we find it difficult to understand why the defense would want to suppress the statement made at City Hall since that is exculpatory. The defendant there said, "I didn't do anything or kill anyone."

MR. SMITH: We are not suggesting that be suppressed.

THE COURT: So we now add to this, defense counsel has indicated to the Court in open court that the statement does not want to be suppressed and we won't take any action on that. We think, under all of the circumstances, that whether or not the defendant's emotional condition was the same or better or worse at 2 o'clock in the afternoon when he made the statements to the police then at the time he talked to the state police at 2 o'clock in the morning is really a question for the jury. We are not convinced as a matter of law or under the evidence that the defendant at the time he made the statements to the two detectives in the car that he was in such a mental or emotional state that he is not accountable for what he said. We, therefore, conclude as a matter of law and find as a fact for the purposes of this suppression hearing that when the defendant made the statement to the police in the police car going to the prison that afternoon that he was able to know what he was doing; that the statements were made voluntarily, without any coercion and not while he was being interrogated by the police and in view of the voluntary nature of the statements to the police and in view of the fact we believe that his physical and mental condition was sufficient to permit him to make the statement, we enter this Order as well:

ORDER

That the Defendant's motion to suppress the oral statements which he made to Det. Thompson and to Det. Bloss on the afternoon of November 21, 1972, is overruled and dismissed. Such statements may be admitted into evidence

against him. We give the Defendant an exception as to all counts.

* * *

We have one last matter for disposition. Admittedly, the testimony of Mr. Spangler was not available to the defendant until just today. Whether it was the defendant's fault or not is another thing, but in any event, the fact is, that the defendant and his counsel did not hear any such statement until Mr. Spangler testified this afternoon. It is true that Mr. Spangler testified that he did not tell anybody about the statements of the defendant to him on the 6th of November, 1972, until sometime after the preliminary hearing in this case ordered by Judge Erb. The assistant district attorney, Mr. Horn, has represented to the Court and we have no reason to disbelieve him, that he was notified that Mr. Spangler had this information about the statement until just a short time before the hearing and he was really not in a position to let Mr. Smith know.

There are several factors in the matter. We are bound, of course, by the Rules of Criminal Procedure, and in view of the fact that the defendant made no written application with this Court for any discovery proceedings or inspection of proceedings, despite the fact he wrote the district attorney prior to this time concerning any oral or written statements, we think that this in effect has been waived; particularly, in view of the answer that the district attorney to Mr. Smith's inquiry about oral or written statements; that he should proceed pursuant to the rules to the discovery rules under the Rules of Criminal Procedure. Mr. Smith's position is, that he couldn't have filed an application because he didn't know about Mr. Spangler's statement. That may well be true, but we think he has a duty to

protect himself by filing the necessary applications so if that turned up it would be another matter. What we note from the rule, that the defendant is not entitled to oral statements. So we suspect that the district attorney's position was that since he is not entitled to any oral statements, even if there were any, he wasn't going to turn them over to Mr. Smith at the time Mr. Smith wrote to him.

We recognize that the defense is surprised by Mr. Spangler's testimony. We recognize that trial in this case is set for this following Monday, January 26. The Commonwealth is vigorously opposed to the continuance requested by Mr. Smith to the February Term 1976. Under all of the circumstances in the case, we do not think it is fair to the Commonwealth to grant a continuance at this time, and, accordingly, the Order of the Court is—

ORDER

That the Defendant's petition for a continuance until the February 1976 Term is overruled and dismissed. We give the Defendant an exception.

I do suggest, however, in this case under the peculiar facts, that the Commonwealth cooperate thoroughly with Mr. Smith in his endeavor to locate Mr. Venable, the one witness mentioned, and Mrs. McQuate, so that these parties may be found at or before the time that this trial commences.

* * *

APPENDIX V

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

No. 210 October Sessions, 1972

(1) Arson

(2) Voluntary Manslaughter (2 cts.)

COMMONWEALTH

vs.

MELVIN H. RITTER, JR.

Appearances:

Richard H. Horn, Esquire, Assistant District Attorney, for the Commonwealth.

Allen H. Smith, Esquire, for the Defendant.

OPINION

The Defendant was indicted for arson and two counts of murder-voluntary manslaughter under the 1939 Criminal Code. At trial during August 13-15, 1973, presided over by the late President Judge George W. Atkins, a jury convicted

the Defendant of arson and two counts of voluntary manslaughter. His post-verdict motions having been dismissed, the Defendant was sentenced to a term of imprisonment in a state correctional institution. One of the critical pieces of evidence against the Defendant at his trial was his confession to the police that he started the fire in the apartment building by setting fire to some boxes in a closet therein.

His conviction was reversed by the Pennsylvania Supreme Court in 462 Pa. 202 (1975) on the ground that the evidence showed that the Defendant, who was in dire need of psychiatric help and exhausted at the time he gave his confession to the police officers, was in no condition to knowingly and intelligently waive his *Miranda* warnings and thereafter confess. The Supreme Court based its decision that the defendant's confession was inadmissible because of the following evidence: The fire broke out on November 17, 1972. The Defendant was arrested by the Pennsylvania State Police on November 21, 1972, and arrived at police headquarters around midnight of this date. Officer Soprano, who conducted the interrogation of the Defendant, testified that he decided that the Defendant had a psychiatric problem and, in fact, tried to reach a psychiatrist prior to questioning the Defendant. The officer additionally stated that during the course of the interrogation the Defendant was whimpering, sobbing and really looked tired. Moreover, the officer stated that the Defendant had not slept for three (3) days prior to the interrogation which occurred from midnight, November 21, 1972 to 3:00 o'clock a.m. November 22, 1972.

At the Defendant's retrial, during January 26-29, 1976, the jury again convicted the Defendant of arson and

two counts of voluntary manslaughter. His motions for a new trial and in arrest of judgment were argued before the Court en banc and this opinion and order are filed on behalf of the Court en banc.

At the Defendant's second trial the Commonwealth's evidence showed that at about 5:45 o'clock a.m., November 17, 1972, a fire started at the Westwood Apartments, a four story apartment building situated at 15 South West Street in the city of York. Robert Little, the Fire Chief of the City of York, testified that when he arrived at the scene of the fire at 6:11 a.m., the building was engulfed in flames which were visible on the first and second floors with heavy smoke. Adjoining the apartment building on the north is a Gulf gasoline service station. Chief Little testified that he found one of the tenants of the third floor of the apartment building, Margaret Rosensweig, lying on a macadam portion of the Gulf station. When he saw her there, she was still alive and moaning. She was taken to the York Hospital where she died. An autopsy revealed that the cause of her death was a skull fracture with subdural hematoma. The pathologist testified that this was consistent with a fall from a second or third story window. Another tenant of the building, Kenneth Williams, was found dead inside the building in his third floor apartment. The pathologist testified that he died from smoke inhalation and resulting carbon monoxide poisoning.

Chief Little also testified that from his examination of the premises he determined that the fire was incendiary in nature and was started in a closet in the stairwell on the first floor. He said that the fire progressed up through the open stairwell to the fourth floor and did extensive damage on all the floors. Although there was fire damage to

the basement, the Chief said that the fire did not start there nor in the boiler room situated therein. He also said that the fire did not start from spontaneous combustion or from accidental means such as a short or other defect in the electrical wiring system within the building.

Detective Vic Castellano of the York City Police testified that when he reached the scene of the fire, the building was burning and he saw Mrs. Rosensweig at her apartment window. He saw her falling in the air and land on a soda machine on the Gulf gasoline Service Station.

Ted Morrison, an electrical inspector for a company licensed to do electrical inspections in Pennsylvania and seven other states on the east coast, testified that he examined the wiring in the apartment building after the fire and that in his opinion there were no defects or any thing else in the building's wiring and electrical system which would have started the fire by accident.

Andrew Smith, the manager of the service department of the Aero Oil Company, which serviced the apartment building under a contract, testified that prior to the fire the entire heating plant of the building, including its wiring system, was in good condition.

Gordon W. Spangler, the manager of the apartment building, which was owned by an out-of-state owner, testified that there were eighteen apartments in the building. He visited the premises three times a week. The closet in the first floor stairwell had a broken lock on its door since November 3, 1973 and was, therefore, accessible to anyone at the time of the fire. On November 6, 1972, he ordered the Defendant, who was a tenant in the building, to vacate the premises and the Defendant told him that he was going

to burn the building down and give it back to him in a heap of ashes. This threat by the Defendant was corroborated by Sara McQuate a tenant of the building, her husband and her thirteen-year-old son, all of whom heard the conversation. Mrs. McQuate also testified that she was in the building when the fire started and because the hallway was in flames she went out onto the balcony and saw the Defendant standing at a B.P. gas station across the street.

Detective Willard Thompson of the York City Police, testified that at 2:00 o'clock p.m. of November 21, 1972, as he and Detective Barry Bloss were transporting the Defendant from the magistrate's office, after arraignment, to the York County Prison, as the police car passed the scene of the fire, the Defendant looked at the burned out building and in a shaky voice, said: "I didn't mean to kill those people. I didn't want to hurt anyone." The scene of the fire was on the direct route from the magistrate's office to the prison. Detective Thompson said that he had known the Defendant three years prior to the incident and while the Defendant was emotional at the time he made the statement and was at the point of crying, the Defendant was otherwise normal, had his senses about him and appeared to know what he was doing. The statement by the Defendant was made spontaneously without any questioning or prompting by the detectives.

Detective Bloss testified that prior to arraignment the Defendant was taken from the York County Prison to the York City Police Department at 1 o'clock p.m. on November 21, 1972 for processing. The processing consisted of fingerprinting the Defendant and obtaining personal information from him for his arrest file. The detective had no difficulty in understanding the Defendant in interrogating him for processing purposes. At some point during this period a radio news cast which was on at the time reported that an arrest had been made in the case. Upon hearing this the Defendant blurted out, "I didn't kill anybody" , and started crying. He was then taken to the magistrate's office for arraignment and there he was advised of his rights and the nature of the charges against him. Detective Bloss said he appeared to understand all of those matters. Detective Bloss also corroborated the Defendant's voluntary and unexpected statement made in the police car and added that the Defendant started crying after he made the statement.

For the defense, Tooper Soprano repeated his testimony at the first trial that he was with the Defendant from about 12:30 a.m. to 9:00 a.m. on November 21, 1972. During this time the Defendant was not acting normal, was whimpering, crying, sobbing and appeared to need psychiatric help. The trooper said that the Defendant told him he hadn't slept for several days.

Gary Miller, a friend of the Defendant testified that he saw the Defendant at the scene of the fire at about 6 a.m. standing across the street. He took the Defendant to work at about 7:00 a.m. and returned with him at about 3:30 p.m. The usually talkative Defendant would say nothing. This was repeated the following day.

Dr. Vance R. Stauffer, Jr., the York County Prison physician, testified for the Defendant, that he examined him at the prison at 10:00 o'clock a.m. of November 21, 1972. The Defendant was crying, very emotionally disturbed and was depressed. He had what the doctor described as psychomotor retardation which means that he

was slow of speech and movement. The doctor said, however, that the *Defendant was not confused and had complete control of his thoughts at that time and was capable of knowing what he was doing.* The doctor also testified that a person who had a reactive depression so that he had grief from an occurrence or an event, if he later had been presented with the fact, it could have produced from him a *spontaneous* statement. Further, the doctor said that it was not until November 29, 1972, eight days after he first examined him, that he referred the Defendant for mental health treatment. After the doctor left the stand, it was stipulated that he would have testified that the Defendant's condition was the same on November 22, 1972 as it was on November 21, 1972 when he examined the Defendant and a letter of the doctor dated June 4, 1972 to the Defendant's counsel was put into evidence. This letter reads as follows:

> "Mr. Melvin Ritter was examined by myself on November 21, 1972, shortly after his incarceration at the York County Jail. He was very emotionally upset with mood swings between crying and belligerency. Initially, depression was the main factor. He wanted to be by himself in solitary confinement, refused to associate with any of the other inmates, and exhibited marked psychomotor retardation.
>
> "On November 24, 1972, he was placed on the antidepressant medication Triavil 2-25. He improved markedly over the next 5 days and a mental health clinic referral was made on November 29, 1972.
>
> "Abusive, loud, belligerent behavior was noted on December 5, 1973. He became so uncooperative that a tranquilizer, Valium, was added to his medical

> regimen. This produced the desired result and on January 5, 1973, I noted that his affect was good. He was smiling, conversing easily and was well groomed.
>
> "After January 15, 1973, I saw him only sporadically and for minor complaints.
>
> "I trust that this information will be of assistance to you."

The fact that the Defendant was withdrawn, untalkative, unresponsive and depressed when he was first admitted to the prison but within four or five days was much better was corroborated by two prison guards and the Defendant's father.

The Defendant testified that he had slept in the apartment building the night before the fire in the apartment of his girlfriend, Sandra Glackin, and his child by Miss Glackin. He arose the morning of the 17th of November, the day of the fire, and left about 6 o'clock a.m. and walked to a friend's house to wait for a ride to work. When he arrived there he realized that he had forgotten his sun glasses and while in the process of returning to get them was informed of the fire. He ran to the apartment building and entered it in an attempt to rescue his girlfriend and child but was unsuccessful. The firemen, shortly thereafter, brought them to safety and the Defendant went to work. He testified that he remembers very little concerning the events thereafter. He also testified that he had had a discussion with Mr. Spangler prior to the fire but denied making any threats. The Defendant's version of the conversation with Mr. Spangler was corroborated by a friend of his also a tenant of the apartment building, Patricia Venable.

James Ward, an electrical contractor testified that he examined the premises after the fire and in his opinion the fire was started accidentally by a short or some other sudden abnormal condition in the electrical wiring system. He pinpointed the cause of the fire as a wire marked with a red tag on a board taken from the electrical system and which was put into evidence. He admitted, however, that the fire could have been incendiary in origin.

In rebuttal, Mr. Ward's theory of the accidental, electrical cause of the fire was disputed by Chief Little and Edward Sheffer, an electrical contractor and volunteer fireman of the City of York.

The Defendant's arguments in support of his motions may be grouped into thirteen categories.

1.

Is the Verdict Against the Evidence, the Weight of the Evidence and the Law?

Arson may be established by circumstantial evidence. *Commonwealth vs. Wineski,* 214 Pa. Super. 397 (1969). That the Commonwealth proved that the crime of arson was committed by the Defendant by circumstantial evidence is beyond dispute. It was the opinion of Chief Little that the fire was incendiary in origin and he pointed out the location within the building where it was started. This, together with the evidence of the threat of the Defendant made to Gordon Spangler, the manager of the apartment building, and all the other facts in the case, is clearly enough to support the verdict of a willful and malicious setting of a fire in the apartment building by the Defendant.

The Defendant argues that there was no evidence of a killing in the heat of passion or hot blood on the part of the Defendant and that the Defendant's threat to Spangler 11 days before the fire may not be considered to support the verdict of voluntary manslaughter. However, our Supreme Court has always held that the return of a verdict of voluntary manslaughter is strictly the jury's prerogative even in the absence of provocation or passion. *Commonwealth vs. Butcher,* 451 Pa. 359 (1973).

Finally, the Defendant suggests that the death of Mrs. Rosensweig was not established as having been caused by the fire. It is hard to take this contention seriously in view of the testimony that the apartment building was burning, that she was a third floor tenant of the building, was seen plummeting from her apartment window and landing on a soda machine on the ground below and that the pathologist gave as the cause of her death a fractured skull. The only realistic hypothesis is that she leaped from her apartment in an attempt to save her life for she surely would have been burned to death if she had remained there. Thus, her death is directly attributable to the acts of the Defendant.

2.

Did the Court Err in Refusing to Suppress the Defendant's Statements Made to the Police at City Hall and in the Police Car?

The Defendant's theory seems to be that, because the Supreme Court of Pennsylvania held that his confession to Trooper Soprano should have been suppressed because of his mental condition, therefore none of his statements

to anyone may be admitted. We do not agree. The Defendant misses the thrust of the Supreme Court decision. The Court suppressed his confession because he was in no condition to knowingly and intelligently waive his *Miranda* warnings. The statements made to the York City Police however, were spontaneous, unexpected and not during the course of or as a result of any interrogation by the police. Accordingly, *Miranda* had no application to them. Defendant argues that they are also inadmissible because he did not know what he was doing at the time he made them by virtue of his mental condition. We think, however, that whether he was mentally capable of making such statements was strictly a question for the jury under all the facts and it was submitted to the jury on that basis. The mere fact that he was emotional and depressed when he made the statements is not enough to make them inadmissible. We perceive no error in this regard.

3.

Is Gordon Spangler's Testimony Concerning the Threat Admissible?

The Commonwealth did not learn that Mr. Spangler would testify to the threat until just before the suppression hearing on January 22, 1976 and therefore was not in a position to notify the Defendant's counsel of this development. At the suppression hearing, after denying the Defendant's request for the Court to refuse to pass on the admissibility of Spangler's statement, the Court then ruled that his statement as to the threat was admissible and, moreover, denied the Defendant's request for a continu-

ance of the trial from January 26, 1976 to the term beginning in February, 1976. Admittedly, the defense was surprised at the suppression hearing when it learned that the Commonwealth wanted to put in Spangler's testimony concerning the threat but it appears clear to us that it was not the Commonwealth's fault for the delay. We believe that the denial of the request for the continuance by the Defendant was proper under the circumstances. All but one of the witnesses to the threat came in to Court at the trial and testified and one of those witnesses was a defense witness. We do not believe that the Defendant was substantially prejudiced by the denial of the continuance.

Defendant contends that Spangler's testimony as to the threat was perjured and, therefore, inadmissible because Spangler was not consistent in all of the details of his testimony and testified at the suppression hearing that he did not tell anyone of the threat right after it happened but later testified at the Defendant's second trial that he had told the then District Attorney of the statement at the Defendant's first trial in 1973. We do not believe any of this makes Spangler's testimony "perjured" or inadmissible. It simply means that his conflicting statements should be considered by the jury in weighing his credibility, and the jury was so charged.

Finally, Defendant argues that the testimony of the threat to burn the building was not admissible because it was made to the owner's agent, not the owner. To buttress this proposition the Defendant's cites *State vs. Battle*, 35 Southeastern 624 (Supreme Court of North Carolina, 1900) and *Clinton vs. State* (Supreme Court of Florida, 1908). The rationale of these two cases is that

upon a charge of arson before the Defendant's threats to burn the building are admissible, it must be shown that the Defendant had ill-will toward the owner of the building, not the agent of the owner. The Defendant has given us no Pennsylvania authorities which endorse this position and we do not believe those cases represent Pennsylvania law. We think that the evidence of the Defendant's threat was admissible under *Commonwealth vs. Minnich,* 250 Pa. 363 (1915) where the Court said at page 371:

> ". . . Second, evidence of threats made by the defendant. With respect to this latter it need only be said that threats and *all* declarations of personal hostility are admissible in evidence as showing malice and tending to show the criminal intent charged. To this end the evidence in the case was directed and it was properly admitted." (Emphasis added.)

This principle was reaffirmed in *Commonwealth vs. Moore,* 397 Pa. 198 (1959). We are persuaded from the broad language used by the Court that on a charge of arson, a threat by the Defendant to burn down the building, no matter to whom it was made, is relevant and admissible.

Moreover, the question of the Defendant's ill-will is essentially irrelevant in an arson case. For example, it was not necessary for the Commonwealth here to show that the Defendant had a motive for setting the fire. It is only required of the Commonwealth to prove that the setting of the fire was willful and malicious. *Commonwealth vs. Nasuti,* 180 Pa. Super. 279 (1956), affirmed 385 Pa. 436. It seems clear to us that the Defendant's prior threat to burn the building was admissible to show,

at least, that he willfully or intentionally burned the building and it is immaterial to whom he made the statement or whether said with ill-will.

There are two other matters to settle in connection with Spangler's testimony. First, the Court refused to permit the Defendant to cross-examine Spangler on the question of whether the building he managed was a problem to him. When the Court made this ruling counsel said nothing and continued in another line of questioning. The Defendant now *after* trial contends that by this line of questioning he wanted to show that Spangler was the one who started the fire. It is unquestionably true i.e. that someone else had set the fire. *Commonwealth vs. Greene,* 366 A.2d 234 (Pa. Supreme Court 1976). However, as we have indicated, upon the ruling of the Court, counsel said nothing and at no time during the trial did he indicate to the Court that he was attempting to show that Spangler was the one who set the fire. He never asked Spangler if he set it nor did he pose any questions to him that in any way, shape or form indicated he was trying to bring out to the jury that Spangler was the arsonist. If he had explained this theory to the Court at trial, the Court would certainly have permitted him to explore it. Instead, it seems obvious to us that counsel thought of this approach after the trial was concluded. Under these circumstances he has waived it. In this context, whether the building was a problem to Spangler was a collateral matter and not a proper subject of cross-examination. It is well established that the scope and limits of cross-examination are within the discretion of the trial judge and will not be reversed in the absence of a clear abuse of discretion or error of law. *Common-*

wealth vs. Greene, supra. We find no such abuse of discretion here.

Secondly, the Defendant attempted to show by cross-examination of Spangler that Spangler had threatened to burn out someone else not involved in this criminal case a few months before the second trial started in January of 1976. Counsel's stated purpose in attempting to pursue this line of questioning was to show that the Defendant did not make the threat to Spangler but rather this statement originated in his corrupt mind and not in the mind of the Defendant. The Court did not permit this line of questioning to continue. Counsel then requested permission to show that Spangler made this threat to burn somebody else out by bringing in the record of or witnesses who testified at a hearing in an equity case held before another judge a week before the Defendant's second trial. The Court refused him permission to do either of these things.

As we have indicated previously, after the trial, the Defendant changed his theory and now claims he was entitled to bring out this evidence to show that Spangler was the arsonist. It is too late for this. His failure to specifically raise the issue that Spangler was the arsonist constitutes a waiver of it.

In any event, this was not a proper area of cross-examination of Spangler. It is the law that evidence of previous occurrences or threats may be admitted to show malice, motive or intent if they are related to the offense for which the Defendant is on trial and if they are not too remote in time. *Commonwealth vs. Faison,* 437 Pa. 432 (1970). For example, in *Commonwealth vs.*

Russella, 117 Pa. Super. 359 (1935), it was held that evidence that the Defendant furnished a new home *one month* after the fire was too remote and therefore not admissible. In this case, Spangler's alleged threat was not related to this criminal case but related to a civil case and is supposed to have been made more than *three years* after the apartment building burned. It is clearly inadmissible under the above cited authorities.

4.

Did the Court Err in Refusing the Defendant's Motion For a Change of Venue Before Trial and For a Mistrial During Trial Because of Newspaper Publicity?

Four or five days before the Defendant's second trial, the two local newspapers published a few articles concerning the case. The articles were straight, narrative reporting of the events that proceded the second trial. They referred to the fire and resulting two deaths, the fact that the Defendant was on bail and that his confession had been suppressed by the Pennsylvania Supreme Court. We believe the Court was correct in refusing the Defendant's motion for a change of venue. *Commonwealth vs. Pierce,* 451 Pa. 190 (1973) held that before a Defendant is entitled to a new trial because of pre-trial publicity, it must appear that the news accounts were so inherently prejudicial that the possibility of a fair trial was questionable. In deciding this issue, some of the factors to consider are whether the pre-trial publicity was extensive, how long before trial the newspaper accounts appear, whether the material was factual and not unduly inflammatory, or so pervasive as to reduce the trial to a hollow formality, whether they reported only straight forward

accounts of the police investigation, judicial proceedings and other matters in the public record, whether the public showed more than a casual interest in the case or were agitated over it, whether the accounts offered interpretations of the case or speculations concerning it, whether they editorialized or contained expressions of defendant's guilt, whether there was a barrage of publicity just before trial and finally whether the Defendant was given an opportunity to voir dire the prospective jurors to determine if they had read the articles and, if so, whether they were affected by them. *Commonwealth vs. Nahodil,* 462 Pa. 301 (1975), *Commonwealth vs. Douglas,* 461 Pa. 749 (1975), *Commonwealth vs. Powell,* 459 Pa. 253 (1974), *Commonwealth vs. Martinolich,* 456 Pa. 136 (1974), *Commonwealth vs. Kloch,* 230 Pa. Super. 563 (1974), *Commonwealth vs. Palmer,* 225 Pa. Super. 370 (1973).

The pre-trial application judge held that the news articles here were merely straight reporting of what occurred in Court proceedings and did not editorialize and were not inflammatory. It is true that they were published shortly before trial, but they were few in number and there was absolutely no evidence that the public interest or passions were aroused by them. The mere fact that there was pre-trial publicity does not in and of itself require a change of venue. It is, of course, regrettable that the newspapers referred to the Defendant's confession and the suppression thereof, but looking at the situation as a whole we do not believe that there was publicity so inherently prejudicial as to prevent the Defendant from receiving a fair trial. It is to be noted that counsel did not choose to voir dire the jury panel con-

cerning the pre-trial publicity although he was given an opportunity to do so.

After the trial commenced the newspapers printed a few articles concerning the proceedings which again referred to the fire, the Defendant's conviction and its reversal by the Pennsylvania Supreme Court. They also referred to some of the Commonwealth's evidence, including the Defendant's statements to the police. One article mistakenly referred to the case as an arson-*murder* trial. Again, we believe that the Court correctly refused the Defendant's motion for a mistrial. We believe the articles were simply straight forward reporting and nothing more. There is no indication that they came any where close to the inherent prejudice required by *Commonwealth vs. Pierce, supra.* Of course, the mistaken reference to an arson-*murder* trial was unfortunate, but not of sufficient prejudice to the Defendant since it was made clear to the jury at all times by both the Court and counsel that the Defendant was on trial for arson and voluntary manslaughter and nothing else.

It should be noted too that the Court properly gave the Defendant an opportunity to have the jurors questioned to ascertain if they had read the articles and, if so, were influenced by them. However, this procedure was refused by counsel. In *Commonwealth vs. Bruno,* 352 A.2d 40 (Pennsylvania Supreme Court—1976) defense counsel requested the Court to interrogate the jury concerning mid-trial publicity and the Court refused to do so. This was held to be error. In *Commonwealth vs. Reese,* 352 A.2d 143 (Pennsylvania Superior Court-1975) the Court (the opinion does not say whether it was on the Court's own motion or at the request of coun-

sel) questioned the jury about the mid-trial publicity and this was deemed appropriate. We know of no case which goes so far as to hold that where, as here, the Court gave counsel an opportunity to have the jurors questioned concerning publicity during trial and it was refused, the Court then on its own volition must interrogate the jurors with respect to it. It should also be pointed out that the newspapers were only printing testimony which the jury heard. Under all these circumstances, we are not persuaded that the publicity during his trial came anywhere near to creating the prejudice required by *Pierce, supra.*

5.

Did the Court Err in Refusing the Defendant the Right to Examine Dr. Stauffer Concerning the Defendant's Mental Condition After the Defendant's Statements Were Made to the Police on November 21, 1972?

The facts are, as we have indicated, that Dr. Stauffer had, without objection, testified that he had referred the Defendant for a mental health evaluation on November 29, 1972, eight days after he first examined him on November 21, 1972. When the Defendant attempted to pursue this area, the Commonwealth objected and the Court initially ruled that Dr. Stauffer's opinion as to the Defendant's mental state was admissible only for the period up to and including the time the statements were made. It was the Court's feeling that whether the Defendant's mental condition improved or deteriorated after that date was not relevant. However, after the doctor had left the stand, it was stipulated by counsel that Dr. Stauffer had examined the Defendant on November 22, 1972 and his condition was the same. For this reason,

over the Commonwealth's objection, the Court later permitted the letter of Dr. Stauffer to be read into evidence and this letter covered the entire period from November 21, 1972 up to and including January 5, 1973. The reason the letter was put into evidence was because by that time the doctor was unavailable to testify in person.

Preliminarily, we believe the Court was correct in its first ruling that the only relevant time for Dr. Stauffer's opinion was up to and including November 21, 1972, the day the doctor first examined the Defendant and the day that the Defendant made the statements to the police. When the Court later permitted the Defendant to explore the period after that date, unfortunately, the doctor was unavailable to testify. However, since his letter fully covered the entire time subsequent to November 21, 1972, we fail to see how the Defendant was seriously prejudiced by not being able to personally examine the doctor. We see no error in the Court's conduct in this instance.

6.

Was There a Conspiracy or a Concerted and Intentional Effort on the Part of the Commonwealth to Hide Evidence From the Defendant Before Trial?

We think not. We have previously discussed the fact that the Assistant District Attorney charged with the trial of this case the second time only learned of Spangler's prospective testimony concerning the threat shortly before the suppression hearing four days before the trial was to start. Accordingly, he did not learn of the other witnesses who heard the threat until that time as well. Mr. Spangler testified that he told the District Attorney who

handled the first trial of the statement but there is no evidence to show that the former District Attorney gave this information to the new District Attorney who was in office at the time of the second trial. Spangler testified that he said nothing to the new District Attorney during all these years because he assumed that the former District Attorney had apprised the new one of the threat. This hardly constitutes evidence of any conspiracy to keep evidence from the Defendant.

The same may be said concerning the testimony of Detectives Thompson and Bloss with respect to the statements made to them in the police car and at police headquarters. At the first trial they did not testify concerning these statements but this was because they were never asked about them. They, too, had told the former District Attorney about the statements and assumed until just before the second trial that the former District Attorney had passed the information along. Upon learning that this was not the fact, they promptly told the Assistant District Attorney in charge of the second trial about the statements. Again we say that none of this constitutes evidence that the Commonwealth engaged in a conspiracy or a concerned effort to hide evidence from the Defendant.

7.

Was Detective Bloss's Testimony Concerning the Defendant's Admissions Perjured?

We think not. Defendant contends that it was and relies solely on the fact that Detective Bloss was inconsistent in his previous testimony concerning if or when

the statements were made. As we have indicated, we do not believe that this makes him a perjurer. It simply means his credibility concerning the statements is for the jury.

8.

Did the Court Err in Admitting the Testimony of Chief Little and Mr. Sheffer and in Refusing the Defendant Permission to Cross-Examine Mr. Morrison on Whether He Had Inspected the Timing Device in the Apartment Building?

Unquestionably, the Court was correct in permitting both Chief Little and Mr. Sheffer to give opinions as to what did or did not cause the fire. Both had extensive training and experience as fire fighters and Mr. Sheffer was a qualified electrician as well. Officials of fire departments may testify as experts in an arson case. *Commonwealth vs. Nasuti, supra.*

The Defendant has withdrawn his motion with respect to Mr. Morrison's testimony, since the record shows that counsel was not hindered in any way in cross-examining this witness.

9.

Did the Court Err in Refusing to Sustain the Defendant's Demurrer?

We hold that it did not. By putting on evidence after his demurrer was refused, the Defendant has waived the right to have the Court on appeal pass upon the trial court's decision to dismiss his demurrer. *Commonwealth vs. Moore, supra, Commonwealth vs. Spanos,* 167 Pa.

Super. 629 (1950). See also *Commonwealth vs. Fuchs*, 227 Pa. Super. 563 (1974) and *Commonwealth vs. Kohne*, 204 Pa. Super. 78 (1964).

10.

Is Defendant Entitled to a New Trial Because He Was Tried by an All-Male Jury?

The answer is no. The Defendant contends that the Commonwealth systematically peremptorily challenged all of the female jurors on the panel of prospective jurors. This argument can carry little or no weight since the record shows that the defense peremptorily challenged two female jurors.

11.

Is the Selection of Prospective Jurors Exclusively From the Voter Registration Lists Unconstitutional?

Defendant so contends but he is wrong. Apparently he has not read *Commonwealth vs. Jones*, 350 A.2d 862 (Pennsylvania Supreme Court—1976) which holds that the system is constitutional. See also *Commonwealth vs. Loccissano*, 366 A.2d 276 (Pennsylvania Superior Court —1976).

12.

Did the Court Err in Permitting the Commonwealth to Read Into the Record Sandra Lauer's Testimony at the First Trial?

We think not. At the time of the second trial, Mrs. Lauer was out of the jurisdiction and could not be located in time to require her to come back to Pennsylvania to

testify under the appropriate statute. It appears that the Commonwealth was not at fault in finding that she had moved too late to proceed under the statute. The Defendant's position is that the Commonwealth must guarantee that each witness is available and should have taken the necessary steps to insure that Mrs. Lauer was available for the second trial. However, we find this position to be unreasonable. It is impossible for the Commonwealth to keep track of all witnesses at all times and we think that they could safely have assumed that Mrs. Lauer was still available when they sent out the subpoenas for the second trial.

13.

Was the Court's Charge to the Jury on the Possible Verdicts Defective?

The Defendant contends that the Court did not make it clear to the jury that it's verdict could have been guilty of any one, both or all three charges of not guilty of any one, both or all three charges. He believes that the jury inferred that it had to find him guilty of all three charges or not guilty of all three charges.

We are mystified by this contention. The following quotation from the trial judge's charge illustrates that the jury surely understood that it had more than just the option of finding the Defendant guilty of all three charges or not guilty of all three charges:

> ". . . Your possible verdicts are as follows: One, you may have a verdict of guilty or not guilty as to the arson charge. Two, you may have a verdict of guilty or not guilty as to the voluntary man-

slaughter count relating to Mrs. Rosensweig. Three, you may have a verdict of guilty or not guilty as to the count of voluntary manslaughter relating to Mr. Williams. But I must impress upon you, your verdict must be addressed to each of the three charges, either guilty or not guilty."

Finally, counsel took no exception to this portion of the charge and, therefore, any objection thereto was waived.

In view of the foregoing, we will enter an order dismissing the Defendant's post-verdict motions.

By the Court,
James E. Buckingham
Judge

Dated: January 24, 1977

APPENDIX VI

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 72 May Term, 1977

COMMONWEALTH OF PENNSYLVANIA
Appellee

v.

MELVIN H. RITTER, JR.,
Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division of York County at No. 210 October Term, 1972

OPINION

JUSTICE MANDERINO, Filed Oct 5 1978:

Appellant, Melvin H. Ritter, Jr., was tried for the second time on January 26, 1976, before a judge and jury and found guilty of arson and two counts of voluntary manslaughter. (Appellant's first trial resulted in a conviction which was reversed by us, *Commonwealth v.*

Ritter, 462 Pa. 202, 340 A.2d 433 (1975).) Post-verdict motions were denied, sentence of imprisonment was imposed, and this appeal followed.

The facts surrounding this appeal may be summarized as follows. On November 17, 1972, at approximately 6:00 a.m., a fire broke out in a four-story apartment building located in the City of York, Pennsylvania. Two residents of the building died as a result of the fire. Investigation of the fire indicated that its origin was incendiary in nature and appellant, who was also a resident of the building at the time, was arrested and charged with starting it, and was ultimately convicted.

Initially, appellant argues that he should be discharged because the evidence presented by the prosecution at his second trial was insufficient to establish that the fire was of incendiary origin. The only reason given by appellant in support of this contention is that the opinion of one of the prosecution's expert witnesses (the Chief of the fire department of the City of York) was without foundation. Chief Robert Little testified as to his education and experience in the field of fire investigation. He stated that he had been employed as fire chief in the City of York since 1963, and that he had completed various courses in firefighting, first aid, and arson investigation during that time. Furthermore, he testified that he had been actively engaged in the investigation of the causes of fires within the City of York and had, over the years, investigated several hundred fires. He testified that he visually examined the scene of the fire in this case and, based upon his education and experience in fire investigations, determined that the fire originated inside a closet under the stairway leading from the first to the second

floor of the four story apartment building. He stated that he could tell the fire began in that closet because of the pattern of the burn in the surrounding area as well as by the depth of the char in the wood in that area. He further testified that in his opinion the fire was of incendiary nature, having been started in some manner not accidental or spontaneous. He specifically stated that he excluded an electrical "short" as a possible cause of the fire. This conclusion was based on the fact that the fire quickly engulfed the stairwell and because the fire was not accompanied by large amounts of smoke. The testimony was properly introduced and, if believed by the jury, as it apparently was, was sufficient to prove that the fire was of incendiary origin.

Appellant also argues that the trial court ". . . should have suppressed all confessions, admissions and spontaneous declarations made by the appellant on or about November 21, 1972." We agree that the court erred in allowing certain witnesses to relate to the jury their allegation that appellant said in their presence: "I didn't mean to kill those people. I didn't want to hurt anyone."

The facts relevant to this issue are as follows. Appellant was arrested and taken to police headquarters, arriving there at approximately 12:30 a.m., November 21, 1972. From the time of his arrival until 3:00 a.m., at which time appellant stated that he set the fire, appellant was interrogated by an investigating state police officer. This officer testified at the suppression hearing held prior to appellant's original trial.

"Officer Soprano, testifying at appellant's suppression hearing, stated that after he initially spoke

with appellant, he decided that appellant had a psychiatric problem and, in fact, tried to reach a psychiatrist prior to questioning appellant. In addition, the officer stated that during the course of the interrogation, appellant was whimpering, sobbing and 'really looked tired.' Moreover, the officer stated that appellant had not slept for three days prior to his interrogation. . . ."

462 Pa. at 203, 340 A.2d at 433.

Based on this officer's testimony, we concluded that the confession was not voluntarily given, and that its introduction into evidence at appellant's first trial was reversible error.

Following our remand, a new preliminary hearing was held at which two police officers employed by the City of York at the time of the investigation of this fire testified for the first time that appellant had, in their presence, made the admission referred to earlier in this opinion—that he did not mean to kill or hurt anyone. Appellant's counsel then filed a petition seeking, among other things, to suppress this alleged admission. It is the trial court's denial of this motion with which we are now concerned.

This alleged admission was testified to by these police officers at the preliminary hearing and at the suppression hearing preceding appellant's second trial, and at the second trial itself. It was purportedly made by appellant as he was being transported from the magistrate's office, after arraignment, back to the York County Prison. The time was between 1:30 and 2:00 p.m., November 21,

1972, (approximately 12 hours after the time of the statement made to interrogating state police officers and ordered suppressed by us). The evidence presented by the prosecution at the suppression hearing preceding appellant's second trial did not indicate that any of the conditions which compelled us to suppress appellant's earlier statement to the state police officer had changed in such a way that would indicate that this subsequent statement was voluntary. In fact, the prosecution's evidence indicates the contrary; that appellant still had not had any rest, that he was "shaky" and "crying," apparently still suffering from the same psychological pressures that prompted the investigating state police officer to seek psychiatric aid for him.

It is not relevant here that the statement ordered suppressed by us in appellant's first appeal was allegedly made in response to police questioning while the statement at issue in this appeal was supposedly "spontaneous." In ruling that appellant's earlier statement to the state police was involuntary, we stated that

> "[T]he line of distinction [between a voluntary and an involuntary confession] is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." *Id.* at 204, A.2d at quoting from *Commonwealth v. Alston,* 456 Pa. 128, 317 A.2d 241 (1974).

We continued, saying: "the testimony of the interrogating officer himself established that appellant was in no condition to knowingly and voluntarily confess to a crime. . ." *Id.* 340 A.2d at 434.

If appellant was in such a state of physical and mental exhaustion at 2:00 a.m. on November 21, 1972, he obviously was in worse condition at 2:00 p.m. of that day unless he was afforded the kind of rest and care that would alleviate his condition. The evidence indicates, however, that during that time, appellant did not sleep, that he was examined by a prison physician who found him to be disturbed, depressed and crying, that he was taken from his jail cell to City Hall for processing (fingerprinting, booking), and was then transported by police car to the magistrate's office for arraignment. The statement allegedly made to the York police officers during the return trip from the magistrate's office to the county jail, like the earlier statements made at the police station, was not the product of appellant's free will. It also must be suppressed.

Judgment of sentence is reversed and a new trial granted.

Mr. Justice Pomeroy, Mr. Justice Nix and Mr. Justice Larsen filed dissenting opinions.

Mr. Justice Pomeroy joins in Mr. Justice Nix's dissenting opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 72 May Term, 1977

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MELVIN H. RITTER, JR.,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division of York County at No. 210 October Term, 1972

DISSENTING OPINION

NIX, J., Filed: Oct 5 1978:

The mere fact that a suspect is in a weakened condition which would justify a finding that he could not effectuate a waiver during police interrogation does not necessarily require the exclusion of spontaneous, volunteered statements which are made in the absence of police interrogation or coercion.

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 72 May Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

MELVIN H. RITTER, JR.,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas of York County, Pennsylvania, Criminal Division at No. 210 October Term, 1972

DISSENTING OPINION

JUSTICE ROLF LARSEN, Filed: Oct 5 1978:

I dissent. The majority totally ignores the testimony of a physician and two police detectives to the effect that the defendant, when he made the spontaneous incriminating statement, knew what he was saying and doing. The Honorable James E. Buckingham was correct in admitting the statement into evidence.

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 72 May Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

MELVIN H. RITTER, JR.,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas of York County, Pennsylvania, Criminal Division at No. 210 October Term, 1972.

DISSENTING OPINION

POMEROY, J., filed Oct. 5, 1978:

I dissent. The findings of fact by the suppression hearing judge were as follows:

> "With respect to the statements made by the defendant to Det. Thompson and Det. Bloss, we find as further facts that the defendant made some statements to the state policeman at or about 2 o'clock in the morning of November 21, 1972. These statements made to the state police were admitted into

evidence at his trial and upon appeal to the Pennsylvania Supreme Court, the matter was reversed by the Supreme Court. . . .

"Now, sometime after the statement of the defendant to the state police, the state police then took the defendant to commit him to the York County Jail, and under the evidence, he reached the jail at 9 o'clock of that same morning of November 21, 1972. Thereafter, at about 1 o'clock that afternoon, the defendant was taken to City Hall at police headquarters there in the City of York where he was processed for arraignment. Prior to that time, he had been read the warrant for homicide and for arson by one of the policemen and after he was processed at City Hall, he was taken to the Magistrate and there arraigned at about 2 o'clock in the afternoon. Then he was driven in a police car from the Magistrate's office to the prison.

"On the way in the police car to the prison in the company of Det. Bloss and Det. Thompson, and as the defendant passed the scene of the fire or at or about that time, the defendant voluntarily and without having been asked any questions by either of the policemen, made the statement 'I didn't mean to kill those people. I didn't mean to hurt anyone.' Moreover, at the time he was being processed at City Hall which was sometime between 1 o'clock in the afternoon and 1:30 o'clock in the afternoon of November 21, 1973, while the defendant was talking to Det. Bloss and at or about the time a radio broadcast was made concerning the defendant being charged with the various crimes in question. Again the defendant

voluntarily and without being interrogated concerning the crimes made the statement in the presence of Det. Bloss, 'I didn't kill anyone.'

"I have incorporated into evidence in this suppression hearing all of the testimony concerning the defendant's mental emotional condition prior to the time that he made the statements to the state police. The defendant himself testified here today that he does not remember anything concerning the events in question. The defendant's father testified that he saw the defendant either the morning of the 21st or the morning of the 22nd, but he does not remember which day, and the substance of the defendant's father's testimony was that the defendant couldn't remember anything and not accountable for what he said.

"On the other hand, both Det. Bloss and Det. Thompson testified that when the defendant was in their presence, either at City Hall or in the car, the defendant appeared normal; that while it is true he did start to cry at or about the time he made the statements in the car, he appeared to be rational and was able to know what was going on. Gerald Sweeney, who was then a detective of the York City Police Department, also testified when he saw the defendant at City Hall the defendant knew what he was doing.

"Preliminarily, we might say we find it difficult to understand why the defense would want to suppress the statement made at City Hall since that is exculpatory. The defendant there said, 'I didn't do anything or kill anyone.'

"MR. SMITH [appellant's counsel]: We are not suggesting that be suppressed.

"THE COURT: So we now add to this, defense counsel has indicated to the Court in open court that the statement does not want to be suppressed and we won't take any action on that. We think, under all of the circumstances, that whether or not the defendant's emotional condition was the same or better or worse at 2 o'clock in the afternoon when he made the statements to the police then [sic] at the time he talked to the state police at 2 o'clock in the morning is really a question for the jury. We are not convinced as a matter of law or under the evidence that the defendant at the time he made the statements to the two detectives in the car that he was in such a mental or emotional state that he is not accountable for what he said. We, therefore, conclude as a matter of law and find as a fact for the purposes of this suppression hearing that when the defendant made the statement to the police in the police car going to the prison that afternoon that he was able to know what he was doing; that the statements were made voluntarily, without any coercion and not while he was being interrogated by the police and in view of the voluntary nature of the statements to the police and in view of the fact we believe that his physical and mental condition was sufficient to permit him to make the statement. . . ."

The suppression court, based upon the above findings, overruled the appellant's motion to suppress the oral statements made to the detectives on the afternoon of November 21, 1972.

We have repeatedly said that when a suppression court's findings of fact are supported by the record, they may not be disturbed by an appellate court. *E.g., Commonwealth v. O'Bryant,* Pa. , 388 A.2d 1059, 1061 (1978); *Commonwealth v. Hall,* 475 Pa. 482, 486, 380 A.2d 1238 (1977); *Commonwealth v. Gray,* 473 Pa. 424, 431, 374 A.2d 1285 (1977); *Commonwealth v. Lewis,* 472 Pa. 235, 239, 372 A.2d 399 (1977); *Commonwealth v. Sparrow,* 471 Pa. 490, 497-98, 370 A.2d 712 (1977); *Commonwealth v. Bundy,* 458 Pa. 240, 328 A.2d 517 (1974). This principle should apply with full force to the case at bar.

SUPREME COURT OF PENNSYLVANIA
Middle District

No. 72 May Term, 1977

Commonwealth of Pennsylvania

v.

Melvin H. Ritter, Jr.,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of York County is reversed and a new trial granted.

Mildred E. Williamson
Deputy Prothonotary

Dated: October 5, 1978

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

CERTIFICATE OF CONTENTS OF REMANDED RECORD AND NOTICE OF REMAND UNDER PENNSYLVANIA RULES OF APPELLATE PROCEDURE 2573 AND 2572

THE UNDERSIGNED, Deputy Prothonotary of the Supreme Court of Pennsylvania, the said court being a court of record, does hereby certify that annexed to the original hereof is a true and correct copy of the whole and entire record as remanded from said court, in the following matter:

No. 72 May Term, 1977

Commonwealth of Pennsylvania

v.

Melvin H. Ritter, Jr.,

Appellant

in compliance with Pennsylvania Rule of Appellate Procedure 2571.

The date on which the record has been remanded is October 27, 1978.

An additional copy of this certificate is enclosed with the original hereof and the clerk or prothonotary of the lower court or the head, chairman, deputy or secretary of the other government unit is hereby directed to acknowledge receipt of the remanded record by executing such copy at the place indicated and by forthwith returning the same.

Mildred E. Williamson

APPENDIX VII

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNA.

No. 210 Oct. Sessions 1972
Murder—Manslaughter

COMMONWEALTH OF PENNSYLVANIA

vs.

MELVIN H. RITTER, JR.

MOTION TO SUPPRESS EVIDENCE

To the Honorable, the Judges of the Said Court:

The application of Melvin H. Ritter, Jr., by his Attorney Allen H. Smith, Esquire respectfully represents:

1.

That the applicant made confessions to the City Police and State Police of York City and Pennsylvania respectively, which confessions were not voluntary.

2.

That the confessions were not voluntary because:

(a) The applicant was not mentally competent at the time the confessions were made.

(b) That the applicant was under fear and duress at the time the confessions were made.

(c) That the confessions should not have been taken or accepted by the Police because they knew at the time such confessions were made that the accused was represented by Allen H. Smith, Esquire, and that his attorney should have been present before any confessions were made or questions asked.

(d) That inducements were made to the accused in order to obtain his confessions, which inducements were illegal and unlawful.

(e) That the accused was subjected to long periods of interrogation and accusation before the confessions were . . .

(f) That the applicant was not effectively warned of his right to remain silent.

(g) That the applicant was not effectively advised of his right to the presence of his attorney.

(h) The applicant was not effectively warned that anything he said would be used against him.

WHEREFORE, applicant prays that your Honorable Court order that a hearing be held to determine the validity of the said confessions.

(s) Allen H. Smith
Allen H. Smith
Attorney for Applicant

ORDER

And now to wit, this th day of April 1973, upon consideration of the within Motion, a rule is granted on the District Attorney of York County, to show cause why the motion as prayed for should not be granted. Rule returnable the 3rd day of May 1973 at 10:00 A.M. when a hearing will be held.

George W. Atkins
P. J.

APPENDIX VIII

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

No. 210 October Term, 1972
Felonious Homicide and Arson

COMMONWEALTH OF PENNSYLVANIA

vs.

MELVIN H. RITTER, JR.

MOTION TO SUPPRESS EVIDENCE

1.

Defendant has been indicted for two counts of felonious Homicide and Arson.

2.

Trial was held in York County and the defendant convicted of two counts of manslaughter and Arson.

3.

The matter was appealed and the Supreme Court reversed the York County Court saying that the confession of the Defendant to police officer Soprano on November

21, 1972 was involuntary because of his physical and mental condition at the time it was given.

4.

On Tuesday, August 7, 1973, depositions were taken of Randy Markey and in the course of these depositions it is alleged by Randy Markey that the Defendant on November 21, 1972 in the late morning or early afternoon hours by telephone, made an admission to Mr. Markey admitting having set the fire.

5.

The depositions of Randy Markey reflect that the Defendant's mind was upset, that the Defendant said he was looking for psychiatric help, he was afraid police officer Sweeney and the District Attorney were going to put him in chains and treat him like a dog, and Defendant indicated that he was being harassed and pursued by the Police, Defendant said he was sick. Mr. Markey indicated that Defendant was nervous and upset.

6.

It would also appear from Mr. Markey's depositions that certain admissions or confessions may have been made at the State Police Barracks in the presence of Mr. Markey later in the evening on or about November 21, 1972.

7.

Defendant maintains and avers that he was physically and mentally incompetent at the time he spoke with Randy Markey on or about November 21, 1972, if he spoke with him.

8.

Defendant maintains that he was physically and mentally incompetent when he was at the State Police barracks in the evening of November 21, 1972.

9.

At the second Preliminary Hearing held before Justice of Peace Forry, on November 25, 1975, it was alleged by Police Officer William W. Thompson, that the Defendant made an admission to him in the presence of Detective Barry Bloss: "I didn't mean to kill those people. I didn't want to hurt anyone. I even came back to help them," and further the Defendant is alleged to have made an admission at City Hall to Detective Barry Bloss, "I didn't mean to do it" in response to a news broadcast that came across the radio when the Defendant was being processed.

10.

Since the Supreme Court has ruled that the confession made to Officer Soprano the evening on or about November 21, 1972 was not voluntary because of his mental and physical condition, Defendant maintains any statements, admissions or confessions made to Randy Markey on or about November 21, 1972 were not voluntary and are incompetent and inadmissible in evidence. Further, any admissions or confessions made to Detective Barry Bloss and Officer Willard Thompson on or about November 21, 1972 are inadmissible in evidence because of the mental and physical condition of the Defendant at the time, the statement being incompetent.

WHEREFORE, Your Honorable Court is requested to suppress any oral or written statements of admission or confessions made to Randy Markey, Officer Willard

Thompson and Detective Barry Bloss allegedly made by this Defendant concerning the offenses of which he is charged, allegedly made by the Defendant on or before or after November 21, 1972.

(s) Allen H. Smith

ORDER

AND NOW, TO WIT, this 24th day of December, 1975, upon consideration of the within Motion and on motion of Allen H. Smith, a Rule is granted on the District Attorney's office to show cause why the evidence should not be suppressed as prayed for. Hearing to be held the 22nd day of January, 1976 at 10:00 A.M.

By THE COURT:
James E. Buckingham
J.